

Remarks/Arguments:

Claims 1-28, 31 and 33-47 are pending.

35 USC § 112

Claim 47 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim is rejected because the term consisting of is not open language, and as such an object that is consisting of two layers may not optionally contain a third layer.

Applicants respectfully disagree. "The transitional phrase "consisting of" excludes any element, step, or ingredient not specified in the claim." MPEP 2111.03 (emphasis added) Although "consisting of" and "consisting essentially of" are closed and virtually closed transitional phrases, optional elements may be recited following these transitional phrases if there is no ambiguity as to the scope of the claim. A claim that recited a "composition consisting of A, B, and C optionally containing D" was upheld under 35 USC § 112, 2nd paragraph because there was no difficulty in determining its scope. *Ex parte Wu*, 10 U.S.P.Q.2d 2031 (Bd. Pat. App. & Inter. 1989). See MPEP 2173.05(h) III. Thus, the specific recitation of an optional third layer does not render the claim indefinite, and Applicants respectfully request withdrawal of the rejection.

35 USC § 103

Claims 1-10, 12-15, 20-24, 27, 28, 31, 34, 36, 41 and 43-47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000). Lin teaches a film having a surface that has been impressed to form "gaps", which the Examiner considers to be equivalent to perforations. The rejection asserts that "...absent a showing of criticality with respect to 'thickness of the film layers and the size and density of the perforations' (a result effective variable), it would have been obvious to a person of ordinary skill in the art at the time of the invention to adjust the 'thickness of the film layers and the size and density of the perforations' through routine experimentation to values, including those presently claimed in order to achieve 'a package which finely controls the final condition of that packaged therein (page 14 lines 22-30)." (emphasis added)

Applicants respectfully disagree that adjusting thickness and perforations to achieve "a package which finely controls the final condition of that packaged therein" would have led to selecting values including those presently claimed for any of the recited features

(thickness, degree of perforation, perforation size, and WVTR). The record contains nothing to indicate that this objective would have led to the presently claimed values, on in fact to any particular values at all. Lin does not mention specific values of any of these variables. Lin enables the skilled artisan to obtain the "fine control" benefit by employing his novel film structure (comprising gaps) to make films having thickness, gap size and degree (density) values and WVTR values varying over an unrestricted range. ALL of Lin's films provide "fine control", regardless of film thickness and regardless of gap size and gap density. Even a very thick film with very few/small gaps provides "fine control" according to Lin's invention, and such a film would have very low WVTR. In view of this, Lin provides no reason to adjust these variables to arrive at any particular values, including those presently claimed.

Applicants respectfully point out that a result-effective variable must by definition refer to some specific result against which effectiveness can be measured. It would defy logic to assert that optimizing a variable toward an unspecified objective would lead to any particular value of that variable, since optimizing for different purposes would be expected to lead to different optimal values. But the rejection does not identify any result, the pursuit of which would have led to the claimed thickness, perforation parameter and WVTR values. Lin does not provide any such target; he has already achieved his objective without concerning himself with these parameters. Only Applicants' disclosure provides a reason for selecting the claimed values. But it would be improper hindsight to use Applicants' own disclosure as a roadmap to select the claimed ranges of the critical parameters from the much broader (in fact, unrestricted) ranges implied by Lin, and then to call such selection obvious. This is all the more true given that Lin does not even discuss suitable values of these parameters.

In the absence of a particular target/result to be sought by optimization, combined with a reason to expect that optimizing for that target would lead to the claimed values, it is improper to assert mere optimization by routine experimentation. For at least this reason, the record does not support the obviousness of a composite film according to claim 1.

Applicants also note that the rejection starts with an incorrect premise, namely that there is no showing of criticality with respect to thickness. Applicants invite the Examiner to recall the data on unperforated 25 micron films in Table 1 of Stephen Sankey's declaration dated 16 June 2009, included with their response of July 13, 2009 and reproduced below:

Table 1

Polymer identity	WVTR (g/m²/day)
Polyethylene terephthalate (PET)	27.5
Linear low-density polyethylene (L-LDPE)	17.5
High-density polyethylene (HDPE)	5
Oriented polypropylene (OPP)	6

At 25 μ m, none of these four films exhibit high permeability (all are less than 27.5 g/m²/day). In particular, none exhibit a WVTR of at least 60g/m²/day, as required by the composite film of claim 1 and as demonstrated by the Examples presented in the specification, which contain an unperforated barrier layer of no more than 12 μ m in thickness. Therefore, Applicants have indeed made "a showing of criticality with respect to thickness of the film layers". Accordingly, the skilled person would have had no reason to modify Lin's teachings to arrive at a film according to Applicants' claim 1.

Separately, and for purposes of an accurate record, Applicants respectfully disagree with the Office's assertion¹ that "... as Lin uses the same materials as those preferred by applicants the film must necessarily ... have the same water vapor transmission rate." Since Lin's films are totally unrestricted in thickness, and could be very thick indeed and have very few and small "gaps", they do not necessarily have the same water vapor transmission rate (WVTR) as Applicants' film (i.e., at least 60 g/m²/day). Applicants note that they use a very thin film (no more than 12 microns for the unperforated barrier layer) to achieve this high degree of permeability. Thus, Lin does not inherently teach the recited WVTR value.

Claims 11 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Rogers (US 4,918,156).

Claims 16, 37 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Dominguez De Walter et al. (US 6,787,630 and hereinafter Dominguez).

¹ Office Action at point 4.

Claims 17, 39 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of McConnell et al. (US 4,450,250).

Claims 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Harrington (US 4,172,824).

Claims 25 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Wang et al. (6,143,818).

Claims 31, 34 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Zobel (US 5,832,699).


Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Varriano-Martson (US 6,441,340 hereinafter Varriano).

All of the above rejections rely on Lin as described above, and Applicants submit that all of these rejections should be withdrawn for the reasons previously discussed.

Conclusion

Applicants submit that the rejections have been overcome, and respectfully request reconsideration and early notice of same. Applicants invite the Examiner to contact their undersigned representative, Frank Tise, if it appears that this may expedite examination.

Respectfully submitted,



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